

87-763

Supreme Court, U.S.
FILED

SEP 30 1987

JOSEPH F. SPANIOL, Jr.
CLERK

NO. _____
IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1987

SANDRA K. ELZEY)

Petitioner,)
(Appellant and)
Plaintiff below),)

v.)

FROM SUPREME COURT
OF THE STATE OF
INDIANA

JACK E. ARCHER, MONTE)

FISHER, DENNIS HOUTZ,)

NYAL FRANTZ, N. E.)

PRINCE, DANIEL L.)

FIGEL, GILES J. PIERRE,)

and OTHER UNKNOWN)

PARTIES)

Respondents,)
(Appellees and)
Defendants below),)

Cause No.
35A02-8604-CV-140

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

Steven Leslie Jackson. Attorney of Record
MILLER, GROTRIAN, STEWART & JACKSON
Third Floor, Paine Webber Building
Fort Wayne, Indiana 46802
Telephone (219) 420-3600

Christopher C. Myers
621 Paine Webber Building
803 South Calhoun Street
Fort Wayne, Indiana 46802
Telephone (219) 424-0600



QUESTION PRESENTED FOR REVIEW

Elzey was arrested in her home county, Wells County of the State of Indiana, without any notice or opportunity to be heard. Her arrest was pursuant to an order signed by Giles J. Pierre, Judge Pro Tempore from Allen County in the State of Indiana. The order of arrest was granted in response to a petition for writ of habeas corpus filed in the wrong county. In effect at the time was an Indiana Statute conferring exclusive jurisdiction in such cases to judges of the county where the applicants were living (in this case, Wells County). Despite the clear language of the statute and the abundant case law of Indiana making clear that the purpose of the statute was to provide exclusive jurisdiction, the trial court granted Pierre's motion for summary judgment and applied the doctrine of absolute judicial immunity.

The question presented is:

Does a judge pro tempore act in clear absence of all jurisdiction and lose absolute immunity when he entertains a petition for writ of habeas corpus in violation of state jurisdictional-limiting statutes and case law, thereby causing a deprivation of an individual's federally protected civil rights under 42 U.S.C. § 1983.

PARTIES TO THIS PROCEEDING

a) Sandra K. Elzey -- the individual arrested and the appellant -- plaintiff in the proceedings below;

b) Giles J. Pierre -- Judge Pro Tempore of Allen County in the State of Indiana.

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FROM SUPREME COURT
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Cause No.
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Telephone (219) 420-3600

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Fort Wayne, Indiana 46802
Telephone (219) 424-0600

PETITION FOR WRIT OF CERTIORARI

Petitioner, Sandra K. Elzey, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana on July 2, 1987, in denying Elzey's petition for transfer which action upheld the opinion of the Court of Appeals of Indiana, Third District, decided on December 8, 1986, affirming the judgment of the Huntington Circuit Court, State of Indiana, granting Respondent Pierre's motion for summary judgment which was based upon the principal of absolute judicial immunity.

REFERENCE TO REPORT OF OPINION

The Indiana Court of Appeals, Third District, opinion may be found at Elzey v. Archer (1987), Ind. App., 500 N.E.2d 1253, and in the appendix. The decision denying Elzey's Petition to Transfer was decided on July 2, 1987, and may be found in the appendix.

JURISDICTIONAL GROUNDS

i) The opinion sought to be reviewed was decided on December 8, 1986, entered on that same date;

ii) The order denying a petition for rehearing was issued by the Indiana Court of Appeals on January 21, 1987, and the order from the Supreme Court of Indiana denying Elzey's petition for transfer was issued on July 2, 1987; and

iii) The statutory provision believed to confer on this Court jurisdiction to review the judgments and opinion in

question by writ of certiorari is United States Supreme Court Rule 17.1 (b)(c).

STATUTORY PROVISIONS INVOLVED

1. United States Constitution, 14th Amendment, Section 1: "...[no state] shall ... deprive any person of life, liberty, or property, without due process of law;"

2. 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Indiana statute I.C. 34-1-57-3:
"writs of habeas corpus may be granted by the circuit or superior courts of the

county in which the person applying therefore may be restrained of his or her liberty, ...; or if said judges be absent from their circuits or by reason of sickness, or other cause, be unable or be incompetent to hear and determine the same, then by any such judge of any adjoining circuit, and upon application, the writ shall be granted without delay."

4. Indiana Code 33-4-4-3 (1984):

"Sec. 3. (a) The circuit court has original jurisdiction in all civil cases and in all criminal cases, except where exclusive jurisdiction is conferred by law upon other courts of the same territorial jurisdiction."

STATEMENT OF PETITIONER'S CASE

Elzey initiated this civil rights claim under 42 U.S.C. § 1983 when she was arrested without notice and without an opportunity to be heard and after serving nearly two days in jail. Days before Elzey's arrest, her ex-husband, Jack Archer, filed in the Allen County Circuit Court a petition for writ of habeas corpus alleging that Elzey was keeping their minor children contrary to a visitation order. Judge Pro Tempore Giles J. Pierre signed and issued a Writ of Habeas Corpus and

an Order, the pertinent part of which is set out below:

"IT IS THEREFORE ORDERED that a Writ of Habeaus Corpus issue out of and under the seal of this court, directed to said Sandra K. Archer, commanding her to have the bodies of Jason Richard Archer and Nathaniel J. Edward Archer before this court forthwith, to do and receive what shall then and there be considered concerning said children, together with the time and cause of their detention and that she have them and there this writ. And it is also ordered that a warrant for the immediate taking of said Jason Richard Archer and Nathaniel J. Edward Archer and for the arrest of said Sandra K. Elzey (formerly Archer) be issued to the Sheriff of Allen County, returnable before this Court." (See opinion in Appendix)

Pierre, acting in Allen County as Circuit Court Judge thereof, issued this Order even though Elzey and her children were residents of and located in Wells County in the State of Indiana. In effect at the time was Indiana Statute I.C. 34-1-57-3, a jurisdictional-limiting statute which conferred sole jurisdiction of habeas corpus matters in the judges of the county where the persons

allegedly kept from their freedom resided.

At the time of Elzey's arrest, the State of Indiana provided a statutory framework by which a person who allegedly disobeyed a court order could be issued a rule to show cause why they should not be held in contempt. I.C. 34-4-7-8. However, Elzey was given no notice of any contempt proceeding as none was ever filed against her, and she was never given a rule to show cause nor was she ever provided a hearing before being arrested. In fact, even after nearly two days of being in jail, Elzey was never brought before a judge.

Claiming that her civil rights were violated, Elzey alleged in her complaint violations of her Constitutional rights protectible under 42 U.S.C. § 1983 and miscellaneous Indiana common law actions against the Judge and the law enforcement officers who cause her arrest. All of the defendants-respondents (except for Archer who

is not a party to this proceeding) filed motions for summary judgment based upon absolute and qualified immunity. Elzey addressed the issue of whether immunity applied as a matter of law in her response to these motions. After the trial courts adverse ruling, Elzey preserved the issue of whether the court properly applied absolute immunity in her motion to correct errors. These issues were also discussed in her appellate brief with the Indiana Court of Appeals and in her petition to transfer filed in the Supreme Court of the State of Indiana. Specifically:

"That the opinion of the Court of Appeals is in error in that:

Alternatively, and even if the opinion of the Court of Appeals correctly followed ruling precedent of the Supreme Court (which petitioner-appellant claims it did not), then such ruling precedent is erroneous or is in need of clarification or modification; specifically, judicial immunity should not be applicable in cases where a jurisdictional-limiting statute and case law was recklessly ignored, causing false arrest and the deprivation of federally-protected

constitutional rights, and law enforcement officers and deputies who arrest an individual without a warrant, when the Order clearly requires one, must be held accountable for their actions for false arrest and the deprivation of federally-protected constitutional rights. (Page 1-2, Appellant's Petition to Transfer)

In her brief in support of the petition for transfer in the Supreme Court of Indiana, Elzey argued that a state court hearing a civil rights claim under 42 U.S.C. § 1983 was as obligated and as competent to decide issues concerning federal Constitutional questions as are federal courts. Consequently, the state of Indiana was to apply the same standards concerning the application of absolute judicial immunity (particularly in actions involving federal rights protectible by 42 U.S.C. § 1983), as federal courts pursuant to the standards set out in Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). (Petitioner-Appellant's Brief in Support of Petition for Transfer, pages 16-18).

ARGUMENT FOR ALLOWANCE OF WRIT

In considering whether a judge is absolutely immune from a civil rights claim, state courts must apply the analysis employed by this Court in Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Both the trial and appellate courts of last resort in the State of Indiana ignored this analysis and applied judicial immunity even though a statute and case authority expressly took away Pierre's power to hear the case. Stump must control all cases involving the application of absolute judicial immunity, both in state and federal courts, because both forums are empowered to hear and protect federal civil rights claims guarded by 42 U.S.C. § 1983.

The rationale supporting the finding of judicial immunity in Stump was that the DeKalb Circuit Court was not foreclosed or prohibited

by statute or case authority from considering the type of petition (sterilization) presented to the court. 55 L.Ed.2d at 340. Elzey's case is strikingly different. Judge Pro Tempore Pierre was prohibited by statute from considering the habeas corpus petition filed in Allen County to free residents of another county. I.C. 34-1-57-3. Indiana case law, construing this statute, prohibited Pierre's consideration of the case. State ex rel. Moore v. Carlin (1948), Ind., 81 N.E.2d 671; Newsome v. Miles (1942), Ind., 44 N.E. 2d 297-298.

The application of absolute judicial immunity in Elzey's case makes a mockery of the exceptions to that doctrine as announced in Stump. Indiana Statute conferred exclusive jurisdiction in habeas corpus matters to a single judge. I.C. 34-1-57-3. I.C. 33-4-4-3 (relied upon in Stump) stated as follows:

"Sec. 3. (a) The circuit court has original jurisdiction in all civil cases

and all criminal cases, except where exclusive jurisdiction is conferred by law upon other courts of the same territorial jurisdiction...."

The emphasized language shows that the Indiana Legislature contemplated that exclusive jurisdiction in particular cases could be conferred by law to other courts. Indiana Code 34-1-57-3 is such a law because it confers exclusive jurisdiction in habeas corpus cases to a particular court. In this case, Giles Pierre, acting judge for the Allen Circuit Court, violated an Indiana statute and case law which conferred exclusive jurisdiction to another court. Therefore, he was clearly absent all jurisdiction when he ordered the arrest of Elzey. Accordingly, judicial immunity, as limited by Stump, is not available to Pierre or the Allen Circuit Court.

The Supreme Court of Indiana, by denying Elzey's petition for transfer, adopted the opinion of the Third District, Indiana Court

of Appeals. In summary, that decision permitted the application of judicial immunity when there was a clear absence of all jurisdiction as explained above. (See Elzey v. Archer (1987), Ind. App., 500 N.E.2d 1253.) The protection of constitutional rights, even by a state court, involves federal considerations. The manner in which the State of Indiana applied judicial immunity has resulted in defeating Elzey's federally protected civil rights under 42 U.S.C. § 1983.

Elzey desires this Court to review her case to express more fervently the exception to judicial immunity as announced in Stump, i.e., that a judge may not claim judicial immunity when he acts in clear absence of all jurisdiction. Specifically, Elzey requests this court to rule that a judge acts in the clear absence of all jurisdiction when he issues an arrest order in total disregard of a state statute and case law both of which

render him powerless to hear the particular matter upon which the arrest order was premised. Should this court decline this opportunity and deny Elzey's Petition for Writ of Certiorari, then state courts may continue to defeat civil rights claims by claiming that the judge acted "beyond his jurisdiction but not without jurisdiction." Elzey v. Archer, 500 N.E.2d at 1255. Pierre's consideration of the habeas corpus matter was without jurisdiction. If not, then I.C. 34-1-57-3 and the cases construing it are meaningless.

Elzey is requesting this court to send a message to both federal courts and state courts alike when it comes to the issue of judicial immunity as applied to judges who interfere with the civil rights of others. The message is merely a stronger restatement of the exception to the application of judicial immunity as announced in Stump; i.e., a judge who interferes with the liberty of a

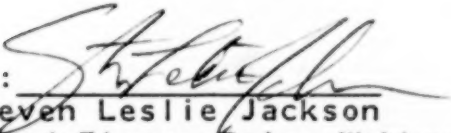
citizen by depriving that person of her freedom without due process of law may not claim judicial immunity if a state statute and case law prohibits the court from hearing the case in the first instance. A judge so acting loses his immunity and must be held responsible for his actions which interfere with and deprive a citizen of her federally protected Constitutional rights.

CONCLUSION

For the foregoing reasons, Elzey prays that this court will issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Indiana and the Indiana Court of Appeals, Third District.

Respectfully submitted,

Steven Leslie Jackson

By: 
Steven Leslie Jackson
Third Floor, Paine Webber Building
803 South Calhoun Street
Fort Wayne, Indiana 46802
(219) 420-3600



APPENDIX



STATE OF INDIANA
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

Cause No.
35A02-8604-CV-00140
Lower Cause No.
C-85-344

SANDRA K. ELZEY-VS-ARCHER, FISHER, HOUTZ,
FRANTZ, ET AL

You are hereby notified that the SUPREME
COURT has on this day, 7/02/87 APPELLANT'S
PETITION FOR TRANSFER IS HEREBY DENIED.
RANDALL T. SHEPHARD, CHIEF JUSTICE. ALL
JUSTICES CONCUR.

WITNESS my name and the seal of said Court,
this 2ND day of JULY, 1987

/s/ Dan Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Cause No.
35A02-8604-CV-00140
Lower Cause No.
C85-344

SANDRA K. ELZEY-VS-ARCHER, FISHER, HOUTZ,
FRANTZ, ET AL

You are hereby notified that the COURT OF
APPEALS has on this day, 1/21/87, APPELLANT'S
PETITION FOR REHEARING DENIED. ROBERT W.
NEAL, ACTION CHIEF JUDGE.

WITNESS my name and the seal of said Court,
this 21ST day of JANUARY, 1987

/s/ Dan Heiser
Clerk Supreme and Court of Appeals

COURT DOCKET, HUNTINGTON CIRCUIT COURT

COMPLAINT

Filed: SEPT. 10, 1985

PARTIES

No. C-85-344

SANDRA K. ELZEY

VS

JACK E. ARCHER, MONTE FISHER, DENNIS HOUTZ,
NYAL FRANTZ, N. W. PRINCE, DANIEL L. FIGEL,
AND OTHER UNKNOWN PARTIES

MINUTES OF THE COURT

January 28, 1986

Comes now the Court and grants Plaintiff's Motion for Summary Judgment as to Defendants, Monte Fisher, Dennis Houtz, Nyal Frantz, N. W. [sic] Prince, Daniel L. Figel, and Giles J. Pierre. The Court finds that there are no genuine issues as to any material fact and that the moving parties are entitled to a judgment as a matter of law. The Court further finds that Defendants, Houtz and Frantz, were not involved in the matters of which plaintiff complained of.

The Court further finds that the Defendants, Figel, Prince and Fisher, were immune for the reason that the order upon which they were acting appeared to be valid on its face.

The Court finds that the Defendant, Pierre, was immuned while acting as Judge Pro Tempore of the Allen Superior Court. The Court further finds that the Allen Superior Court had continuing jurisdiction in the dissolution matter herein involved.

COURT DOCKET, HUNTINGTON CIRCUIT COURT

COMPLAINT

Filed: SEPT. 10, 1985

PARTIES

No. C-85-344

SANDRA K. ELZEY

VS

JACK E. ARCHER, MONTE FISHER, DENNIS HOUTZ,
NYAL FRANTZ, N. W. PRINCE, DANIEL L. FIGEL,
AND OTHER UNKNOWN PARTIES

MINUTES OF THE COURT

January 31, 1986

The Court now corrects its order of January 28, 1986, and shows that the first sentence should read: Comes now the Court and grants Defendant's Motion for Summary Judgment as to Monte Fisher, Dennis Houtz, Nyal Frantz, N. W. Prince, Daniel L. Figel and Giles J. Pierre.

COURT DOCKET, HUNTINGTON CIRCUIT COURT

COMPLAINT

Filed: SEPT. 10, 1985

PARTIES

No. C-85-344

SANDRA K. ELZEY

VS

JACK E. ARCHER, MONTE FISHER, DENNIS HOUTZ,
NYAL FRANTZ, N. W. PRINCE, DANIEL L. FIGEL,
AND OTHER UNKNOWN PARTIES

MINUTES OF THE COURT

April 16, 1986

Plaintiff's Motion to Correct Errors is
overruled and denied.

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

SANDRA K. ELZEY,)	
)	
Appellant)	
(Plaintiff Below))	
)	
v.)	No. 35A02-8604-CV-140
)	
JACK E. ARCHER, MONTE)	
FISHER, DENNIS HOUTZ,)	
NYAL FRANTZ, N.E.)	
PRINCE, DANIEL L.)	
FIGEL, GILES J. PIERRE,)	
and OTHER UNKNOWN)	
PARTIES,)	
)	
Appellees)	
(Defendants below)))	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
HONORABLE DANE MANN, JUDGE

CAUSE	NO.	C-85-344
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HOFFMAN, J.

Plaintiff-appellant Sandra K. Elzey
appeals an order granting summary judgment in
favor of defendants-appellees Monte Fisher,
Dennis Houtz, Nyal Frantz, N. E. Prince,
Daniel L. Figel and the Honorable Giles J.
Pierre. Elzey filed a complaint against the

defendants¹ for unlawful arrest and for violation of 42 U.S.C. § 1983.

The facts relevant to this appeal disclose that Jack Archer, Elzey's ex-husband, filed a petition for writ of habeas corpus on July 1, 1983, alleging that Elzey was depriving Archer of lawful custody of their two minor children. That day Allen Circuit Court Judge Pro Tempore Giles Pierre signed a writ of habeas corpus which in relevant part stated:

"IT IS THEREFORE, ORDERED that a writ of habeas corpus issued out of and under the seal of this court, directed to said Sandra K. Archer, commanding her to have the bodies of said Jason Richard Archer and Nathaniel J. Edward Archer before this court forthwith, to do and receive what shall then and there be considered concerning said children, together with the time and cause of their detention, and that she have them and there this writ. And it is also ordered that a warrant for the arrest of said Sandra K. Elzey (formerly Archer) be issued to the sheriff of Allen County, returnable before this Court."

¹ Other defendants named in the complaint are not parties to this appeal.

On July 4, 1983, Elzey, who lived in Wells County, was arrested and placed in custody along with her two sons. They were driven to the Wells County/Allen County line and transferred to an Allen County police vehicle. From the county line, they were transported to Allen County jail. Elzey was held overnight in the jail and the children were released to their stepfather.

It is undisputed that contempt proceedings were not instituted prior to the habeas corpus action, that Elzey was never given notice or a hearing prior to the arrest and that Elzey was not taken before a judge upon her release from jail. In July 1985 Elzey instituted suit against the police officers, sheriffs, judicial officer and others involved in her arrest.

The trial court granted summary judgment in favor of the police officials based upon a facially valid order for Elzey's arrest.

Summary judgment for Judge Pierre was based upon judicial immunity. Elzey appeals and raises several issues for review. As restated and consolidated the issues presented are:

(1) whether the trial court erred in determining that Judge Pierre was entitled to judicial immunity in that I.C. 34-1-57-3 (1982) deprived Judge Pierre of all jurisdiction and jurisdiction could not be based upon continuing jurisdiction over dissolution matters;

(2) whether the trial court erred in determining that the order upon which Elzey was jailed, was valid on its fact; and

(3) whether the trial court's order granting the summary judgment was contrary to law in that Elzey's illegal arrest and incarceration violated 42 U.S.C. § 1983.

Summary judgment is appropriate when no genuine issue of material fact is in dispute and the moving party is entitled to a judgment as a matter of law. Tippecanoe San. Landfill v. Bd. of Cy. Com'rs (1983), Ind. App., 455 N.E.2d 971, 974. On review, this Court must determine whether the trial court properly

applied the law. Tippecanoe, supra. In determining the propriety of a summary judgment, all facts established by the non-moving party must be taken as true, and any doubts should be resolved against the proponent of the motion. In the present case Elzey complains only of the trial court's application of the law to the facts.

Elzey's first allegation of error is based upon an interpretation of a portion of the habeas corpus statutes, I.C. 34-1-57-3, which Elzey contends would deprive Judge Pierre of all jurisdiction over the habeas corpus petition in the present case. Elzey further contends that Judge Pierre could not base jurisdiction of the habeas corpus action upon the trial court's continuing jurisdiction over matter in a dissolution proceeding.

I.C. 34-1-57-25 (1982) specifically allows the use of writs of habeas corpus by parents in actions concerning their children.

The statute states:

"Writs of habeas corpus shall be granted in favor of parents, guardians, and spouses; and to enforce the rights and for the protection of infants and insane persons; and the proceedings shall, in all such cases, conform to the provisions of this chapter." I.C. 34-1-57-25

The statute requires conformance with other provisions of the habeas corpus statutes. Indiana Code 34-1-57-3 delineates the judges who are authorized to issue writs of habeas corpus. The section provides:

"Writs of habeas corpus may be granted by the circuit or superior courts of the county in which the person applying therefore may be restrained of his or her liberty, or by the judges of said courts, whether in term or vacation; or if said judges be absent from their circuits, or by reason of sickness, or other cause, be unable or be incompetent to hear and determine the same, then by any such judge of any adjoining circuit, and upon application, the writ shall be granted without delay." I.C. 34-1-57-3

The applicants in the present case, the children, lived and, according to the petition filed by their father, were restrained in

Wells County. Judge Pierre was judge pro tempore for the Allen Circuit Court at the time that he granted the writ. Elzey contends that the writ granted by Judge Pierre in Allen County was issued absent all jurisdiction.

In Owen v. Vaughn (1985), Ind. App., 479 N.E.2d 83, this Court sets forth the standard by which judicial immunity applied. It was noted that:

"A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in the excess of his authority. Rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" (Citations and footnotes omitted.) Owen, supra, 479 N.E.2d at 86.

In a case which arose from an Indiana Circuit Court action, the United States Supreme Court determined that a judge sitting in an Indiana Circuit Court which by statute² enjoyed "original exclusive jurisdiction in all cases

² I.C. 33-4-4-3 (1982)

at law and in equity" was not acting in clear absence of all jurisdiction. Stump v. Sparkman (1978), 435 U.S. 349, 357-359. The Court in Stump gave the following example of the distinction between lack of jurisdiction and acting beyond the jurisdiction:

"[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune." (Citation omitted.) Stump, supra, 435 U.S. at 357, footnote 7.

In the present case, I.C. 34-1-57-3 allows judges of superior or circuit courts in adjoining counties to grant writs of habeas corpus under certain circumstances. Even though there was no indication that the circumstances were applicable, Judge Pierre, sitting in a court with authority to grant writs of habeas corpus, was acting beyond his jurisdiction but not without jurisdiction.

See, Stump, supra. As such, Judge Pierre is entitled to judicial immunity, and this court need not determine whether the writ could have been granted based upon the continuing jurisdiction of the Allen Circuit Court over custody matters arising from the dissolution proceeding.

Next, Elzey questions the propriety of the summary judgment granted in favor of the sheriffs and their deputies. Specifically, Elzey contends that the order upon which she was jailed was not valid on its face.

This Court in Stine v. Shuttle et al. (1962) 134 Ind. App. 67, 74, 186 N.E.2d 168, 172, stated:

"It is also a general rule of law that a process or warrant not void on its face issued by a tribunal having general jurisdiction of the subject matter is a protection to the officer executing it, and the officer is not required to look beyond the process or warrant or determine the validity or regularity of the proceedings on which it is founded, or to exercise his judgment touching its validity in a point of law or by the fact that the process may have been obtained

fraudulently or that his feelings toward the party arrested were malicious or by notice of facts which might render the arrest improper. Even though a process may have been issued irregularly by a party who might be liable, it is nevertheless a protection to the officer executing it. See Vol. 35, C.J.S., p. 539-540. It is only where a process is void on its fact that the arresting officer is not protected. Vol. 35, C.J.S., p. 541."

Thus, the sheriffs and their deputies would be protected from liability even though the process was issued irregularly if the process was not void on its face and was issued by a court with general jurisdiction over the [sic] subject matter. The process issued in the present case did not meet the procedural guidelines provided in the habeas corpus statutes. However, it has already been determined that the Allen Circuit Court had jurisdiction over the subject matter. Unless the process was void on its face without requiring the executing officer to determine its regularity or determine its validity on a point of law, the officers here are entitled

to protection from liability.

While not a study in clarity, the deficiencies in the process in Elzey's case were based upon points of law. The order was somewhat ambiguous as to whether it was ordering the immediate taking of the children and the arrest of Elzey or whether an arrest warrant was to be issued. Indiana Code 34-1-57-24 (1982), in pertinent, part provides that "no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person or the purport of the process." The import of the order could be determined and was acted upon by the deputies.

Further, I.C. 34-1-57-18 (1982) states that "[n]o sheriff or other officer shall be liable to a civil action for obeying any writ of habeas corpus or order of discharge made thereon." From the foregoing it is apparent that the sheriffs and their deputies are

entitled to protection from liability for their part in executing the order.

The two issues discussed are dispositive of Elzey's third issue: that the defendants' actions violated 42 U.S.C. § 1983. Section 1983 requires state action. The determination that the state agents are immune from liability or protected from liability defeats the § 1983 claim.

See generally: Stump, supra;

Mother Goose Nursery Schools,
Inc. v. Sendak (7th Cir.
1985), 770 F.2d 668;

Coleman v. Frantz (7th Cir.
1985), 754 F.2d 719

Accordingly, the trial court's granting of summary judgment as to the above defendants is affirmed.

Affirmed.

STANTON, P.J., and GARRARD, J., Concur.

